

REMARKS

Reconsideration of this application, as amended, is respectfully requested.

The election of claims 1 – 32 is hereby confirmed. Claims 33 – 35 have been cancelled.

Claims and 3, 4, 7 – 12, 14 – 18, 20, 22 – 26, and 29 – 35 have been cancelled and so the rejections of these claims is now moot. Cancellation of these claims should not be read as acquiescing in the comments made in the Office Action. Rather, these claims were cancelled solely to narrow the issues in this application and to allow for rapid action on the part of the examiner. Claims cancelled in this amendment may subsequently be reintroduced by way of one or more continuation or divisional applications.

Claim 1 has been amended to recite subject matter formerly recited in claims 3 and 4. Claim 28 has been amended to recite subject matter formerly recited in claims 29 and 30. The remaining amendments affect only dependency and changes to conform to the amendments of the independent claims. Hence, no new matter is added by any of the amendments.

All of the presently pending claims are patentable over DeBey, US 5,421,031, because the office action admits that DeBey '031 fails to teach a system of method in which a schedule is determined according to an earliest deadline first (EDF) process. See Office Action at paragraph 8.

To supply this missing teaching, the Office Action suggests combining the teachings of DeBey '031 with Willard, US 6738972. However, in rejecting claims under 35 USC §103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See, *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art having the references before him to make the proposed combination or other modification. See *In re*

Lintner, 458 F.2d 1013, 1016 (CCPA 1972). Furthermore, the conclusion that the claimed subject matter is prima facie obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary skill in the art that would have led that individual to combine the relevant teachings of the references to arrive at the claimed invention. See *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988). Rejections based on Section 103 must rest on a factual basis with these facts being interpreted without hindsight reconstruction of the invention from the prior art. The examiner may not, because of doubt that the invention is patentable, resort to speculation, unfounded assumption or hindsight reconstruction to supply deficiencies in the factual basis for the rejection. See *In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967) cert. denied, 389 U.S. 1057 (1968). Indeed, the U.S. Court of Appeals for the federal Circuit has repeatedly cautioned against employing hindsight by using the applicant's disclosure as a blueprint to reconstruct the claimed invention from the isolated teachings of the prior art. See, e.g., *Grain Processing Corp. v. American Maize-Prods. Co.*, 840 F.2d 902, 907 (Fed. Cir. 1988).

In this case it appears such hindsight reconstruction has been used. For example, the Office Action points out that DeBey '031 teaches a scheme in which scheduling is performed on a periodic basis without regard as to the characteristics (specifically the time lengths) of the segments being scheduled. See Office Action discussion of the rejection of claim 28, *citing* DeBey '031 at col. 8, ll. 44-49 and 54-59. However, the EPT process now claimed and supposedly disclosed by Willard specifically makes use of segment characteristics (e.g., segment deadline for transmission) and the Office Action appears to recognize this fact. See, e.g., Office Action discussion of Willard in paragraph 8. Nothing in the references themselves (or any other cited evidence) suggests that a scheduling system that relies on segment characteristics, such as the Willard scheme cited in the Office Action, can or even should be adapted for use with a scheme in which scheduling is performed independently of such characteristics, such as the DeBey '031 scheme relied upon. Instead, it is only the applicants' own disclosure that teaches how such disparate techniques can be adapted for use together. It now appears that this teaching has been used as a blueprint to assemble components of the prior art in a manner

not suggested by the references solely for purposes of setting for a rejection under Section 103. Such a rejection is improper and should be removed. Hence, the present claims should be found patentable over the combination of these references.

With respect to the rejection of former claims 9 10, 12, 25 and 31 in light of the combination of DeBey '031 and Kermond, the cancellation of these claims renders the rejections moot. Nothing in the Office Action suggests that Kermond would cure the above described deficiencies of DeBey '031 and Willard and so the patentability of the present claims is not affected by Kermond, whether considered alone or in combination with these other references.

With respect to the rejection of former claims 11 and 26 in light of the combination of DeBey '031, Kermond and DeBey (US 6,519,693), the cancellation of these claims renders the rejections moot. Nothing in the Office Action suggests that DeBey '693 would cure the above described deficiencies of DeBey '031 and Willard and so the patentability of the present claims is not affected by DeBey '693, whether considered alone or in combination with these other references.

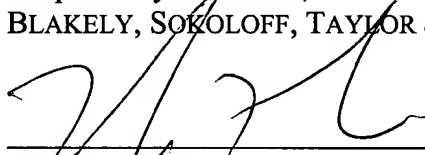
With respect to the rejection of former claim 13 in light of the combination of DeBey '031, Willard and DeBey '693, claim 13 has been amended to now depend from claim 1. Nothing in the Office Action suggests that DeBey '693 would cure the above described deficiencies of DeBey '031 and Willard. Specifically, DeBey '693 does not appear to teach or suggest the use of an EDF scheduling process as recited in claim 1 (and, hence, is necessarily present in claim 13 which depends from 1) and so the patentability of the present claims is not affected by DeBey '693, whether considered alone or in combination with these other references.

With respect to the rejection of former claim 27 in light of the combination of DeBey '031 and Aggarwal (US 5,751,336), claim 27 has been amended to now depend from claim 1. As indicated above claim 1 is patentable over DeBey '031 and, accordingly claim 27 is likewise patentable over DeBey '031. Further, Aggarwal does not teach or

suggest a method in which a schedule is determined according to an earliest deadline first (EDF) process and so claim 27 is patentable over DeBey '031 even when considered in combination with Aggarwal.

If there are any additional charges, please charge Deposit Account No. 02-2666. If a telephone interview would in any way expedite the prosecution of the present application, the Examiner is invited to contact Tarek Fahmi at (408) 947-8200 ext. 204.

Respectfully submitted,
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